Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

CHARLES O. GRIGSON, as Trustee for the Owners of *The Texas Chainsaw Massacre*, RIVER CITY FILMS, INC., and ULTRA MUCHOS, INC.,

Petitioners,

v.

CREATIVE ARTISTS AGENCY, L.L.C., and MATTHEW DAVID MCCONAUGHEY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a federal court can exercise equitable "discretion" to expand the scope of the Federal Arbitration Act to compel arbitration of the claims of a signatory against a non-signatory to the arbitration contract?

LIST OF PARTIES

Appellants below:

Charles O. Grigson, as Trustee for the Owners of *The Texas Chainsaw Massacre*

River City Films, Inc.

Ultra Muchos, Inc.

Appellees below:

Creative Artists Agency, L.L.C.

Matthew David McConaughey

STATEMENT REQUIRED BY RULE 29.6

Pursuant to Rule 29.6 of the Rules of this Court, petitioners state that neither River City Films, Inc., nor Ultra Muchos, Inc., has a parent company. Petitioners further state that no publicly held company owns 10% or more of the stock of either River City Films, Inc., or Ultra Muchos, Inc.

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PETITION FOR WRIT OF CERTIORARI

Charles O. Grigson in his capacity as Trustee for the Owners of *The Texas Chainsaw Massacre*, River City Films, Inc., and Ultra Muchos, Inc., petition the Court to issue a writ of certiorari to review a judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The court of appeals' opinion (Pet. App. 1a-35a) is published at 210 F.3d 524 (5th Cir. 2000). The court of appeals' order denying the petition for rehearing and for rehearing en banc (Pet. App. 47a-48a) is published at 218 F.3d 745 (5th Cir. 2000) (Table). The dismissal order of the United States District Court for the Western District of Texas, Austin Division (Pet. App. 38a-44a), is not reported in the official reporters.

JURISDICTION

The court of appeals issued its opinion on April 24, 2000, and filed its judgment the same day. The court of appeals denied rehearing and rehearing en banc on June 1, 2000. On August 25, 2000, Justice Scalia extended the time for filing this petition for a writ of certiorari to and including September 29, 2000. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED IN THE CASE

The *Seventh Amendment* to the Constitution of the United States provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall otherwise be reexamined in any Court of the United States, than according to the rules of the common law.

The provision of the Federal Arbitration Act codified as *9 U.S.C. § 2* provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT OF THE CASE

Factual background

In 1993 and 1994, after acquiring rights to the cult horror film *The Texas Chainsaw Massacre*, River City and Ultra Muchos began production of a sequel that came to be known as *Return of the Texas Chainsaw Massacre*. Actors Matthew McConaughey and Renée Zellweger, then

obscure though later well-known, were members of the cast.

The sequel was completed and ready for theatrical release in 1995. However, by that point, both McConaughey and Zellweger had achieved fame in popularly acclaimed movies – McConaughey in *A Time to Kill* and Zellweger in *Jerry Maguire*. Around this time, McConaughey hired one of the most powerful Hollywood talent agencies, Creative Artists, to be his agent.

In October of 1995, shortly before the boost to McConaughey's movie career, River City and Ultra Muchos had entered an agreement with Columbia TriStar Home Video, Inc. ("Columbia TriStar" or "TriStar"), for theatrical distribution of the *Chainsaw* sequel ("the Distribution Agreement"). In exchange for giving TriStar exclusive distribution rights, River City and Ultra Muchos received a guarantee of minimum returns, plus a right to a share of gross receipts. Through a previous agreement with the producers, the *Chainsaw* owners (through their trustee, Grigson, appointed several years earlier by the federal district court for the Western District of Texas) were to receive a portion of the gross receipts received by River City and Ultra Muchos.

Neither Creative Artists nor McConaughey was a party to the Distribution Agreement. Instead, the two sets of "Parties" to the Distribution Agreement were TriStar (plus its affiliates, subsidiaries, and parent companies) and River City and Ultra Muchos. In paragraph 22(e), they agreed as follows:

> The Parties hereto agree that any dispute or controversy relating to any of the matters

> referred to in clauses (d)(i), (ii) or (iii), above, shall be decided by a Rent-A-Judge, mutually selected by the parties . . . , sitting without a jury, in Los Angeles County California, and the Parties hereby submit to the jurisdiction of such court.[1]

The cross-referenced clauses in paragraph 22(d) concern:

> (i) the validity and interpretation of this agreement; (ii) the performance by the Parties of their respective obligations thereunder; and (iii) all other causes of action (whether sounding in contract or in tort) arising out of or relating to this Agreement[.]

Not only were Creative Artists and McConaughey not parties to the Distribution Agreement; neither participated in its negotiation. McConaughey is not mentioned in the agreement. Furthermore, neither Creative Artists nor McConaughey was to receive any benefits under the contract: paragraph 14(a)(x) specifically provides that actors in the movie were to draw no payments from revenues generated by its distribution.

At this time, Columbia TriStar also was handling distribution of *Jerry Maguire*, and it initially delayed theatrical release of the *Chainsaw* sequel to take advantage of Zellweger's starring role in that hit movie. The marketing plan for the *Chainsaw* sequel was to highlight the role of both stars in order to take advantage of the huge box office draws they had come to represent. These plans

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[1] It is undisputed that the procedure referred to in this paragraph "is the equivalent of arbitration[.]" Pet. App. 4a.

changed in the fall of 1996 or early 1997 when Creative Artists intervened in the movie's distribution plans prior to its release.

Acting as McConaughey's agent, Creative Artists first successfully pressured TriStar to retreat from plans to widely distribute *Chainsaw* posters it had printed, prominently featuring McConaughey's name and likeness. Then, Creative Artists pressed TriStar still further, encouraging it to retreat from making a major theatrical release of the sequel.

TriStar succumbed to Creative Artists and made only a limited theatrical release of the *Chainsaw* movie in the summer of 1997, unaccompanied by media fanfare. The limited release brought drastically reduced revenues from the movie, lowering the returns to the *Chainsaw* producers and owners by millions of dollars from the level they would have achieved with a major, well-publicized release.

Initially, the *Chainsaw* trustee sued Columbia TriStar and the *Chainsaw* producers, River City and Ultra Muchos. TriStar moved to compel arbitration, invoking paragraph 22(e) of the Distribution Agreement. The trustee thereafter moved for voluntary dismissal of the case under Federal Rule of Civil Procedure 41(a). The federal district court granted the unopposed motion. Pet. App. 40a-41a.

District court proceedings

A short while later, the owners' trustee and the producers of the *Chainsaw* sequel joined together and sued

Creative Artists and McConaughey in state court, claiming they tortiously interfered with the TriStar distribution agreement.[2] The *Chainsaw* plaintiffs demanded a jury trial. Creative Artists and McConaughey removed the case to federal court on the basis of diversity of citizenship.[3] There, they moved to compel arbitration under the Federal Arbitration Act, seeking to have the case dismissed and force the dispute into the California "Rent-A-Judge" process specified in the paragraph 22(e) of the distribution agreement to which Creative Artists and McConaughey were not parties.

The district court granted the motion to compel arbitration and entered final judgment, dismissing the action without prejudice. Pet. App. 45a. Citing two cases from the Eleventh Circuit,[4] the court determined that "the equitable estoppel exception" applied to confer on Creative Artists and McConaughey "standing to enforce the arbitration agreement" to which they were not parties. Pet. App. 43a. The court found that the *Chainsaw* plaintiffs' claims were "so intertwined with and dependent

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[2] They also claimed breach of a separate actor's contract between McConaughey and the *Chainsaw* producers, which contains no arbitration clause.

[3] The parties divided on the diversity issue of whether McConaughey was a Texas citizen (the basis for suing in state court) or a California citizen (the basis for diversity removal to federal court).

[4] *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753 (11th Cir. 1993), *cert. denied*, 513 U.S. 869 (1994), and *McBro Planning and Development Co. v. Triangle Electrical Constr. Co.*, 741 F.2d 342 (11th Cir. 1984). The court also cited two Texas cases that did not involve the Federal Arbitration Act.

upon the Distribution Agreement that the arbitration agreement within the Distribution Agreement should be given effect." Pet. App. 43a.

Fifth Circuit ruling and dissent

The Fifth Circuit affirmed the district court in a divided 2-1 panel vote.

Majority. The majority acknowledged that the question of whether a non-signatory to a contract with an arbitration clause could compel arbitration by a signatory under an "equitable estoppel theory" was an issue of "first impression" in the Fifth Circuit. Pet. App. 5a. It then considered decisions in the Eleventh and Seventh Circuits which it viewed as applying equitable estoppel to compel arbitration on the "intertwined-claims basis" when a non-signatory sought to compel arbitration of a signatory's claims against it. Pet. App. 5a.

Mentioning the Federal Arbitration Act only once, Pet. App. 4a, the majority used "fairness" as the basis for its adoption of the equitable "intertwined-claims" theory for imposing arbitration. Pet. App. 7a. It found the equitable power to order arbitration to be discretionary with the district court, reviewable only for abuse. Pet. App. 8a.

The court held that the "intertwined-claims" theory of equitable estoppel fits the facts of this case by surmising that the actions of non-defendant, Columbia TriStar, which *was* a signatory to the arbitration agreement, would be at the center of the *Chainsaw* plaintiffs' legal dispute with non-signatories, Creative Artists and

McConaughey. Pet. App. 11a. This, and the factual similarity between the instant action and the earlier one against TriStar that had been voluntarily dismissed, led the majority to conclude that the claims in the second suit were "intertwined with, and dependent upon, the distribution agreement." Pet. App. 14a. Thus, the court concluded, the district court had not abused its discretion in ordering arbitration using the equitable estoppel doctrine. Pet. App. 14a.

Dissent. Judge Dennis in dissent questioned both the foundations of the equitable estoppel doctrine itself and its application to this case. Pet. App. 14a-35a. He recognized that the Federal Arbitration Act might permit a non-signatory to acquire arbitration rights "under ordinary state-law principles of agency or contract." Pet. App. 17a. He concluded, however, that the majority had abandoned those principles in favor of a theory not based in contract.

Terming the estoppel theories of the circuits whose decisions the majority relied upon "amorphous" and "misnamed," the dissent found that they "conflict with and endanger the basic principles" laid down by this Court in connection with compelling arbitration under the Federal Arbitration Act. Pet. App. 32a.[5] It explained

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[5] The dissent identifies this Court's basic principles as: "(1) a person cannot be required to submit to arbitration any dispute which he has not agreed so to submit, (2) a person who has not agreed to arbitrate will normally have a right to a court's decision about the merits of its dispute, and (3) ordinary state-law principles governing the formation of contracts should be applied when deciding whether the parties agreed to arbitrate a certain matter." Pet. App. 32a.

its fundamental problem with the majority's adoption of the equitable theory:

> The trouble with that kind of use of the estoppel label by the majority in this case making circuit precedent is that it will seriously hinder this court in upholding the basic principle that a person has a right to a court's decision about the merits of a dispute unless he has agreed to submit it to arbitration.

Pet. App. 14a-15a.

Besides questioning the premise that equity can force arbitration when statutes do not, the dissent also questioned the doctrine's application in this case.[6] Painstakingly canvassing possible contract-based rationales for requiring arbitration in this setting, the dissent found no basis for doing so. Instead, it found the broad, categorical statements of such cases as *MS Dealer Service Corp. v. Franklin*, 177 F.3d 942 (11th Cir. 1999) (used as the principal authority for the majority's holding), insufficient to "unleash[ ] an indeterminate precedent" that can force arbitration of "countless" disputes "without even a semblance of . . . agreement under ordinary state-law principles of contracts, agency or equitable estoppel." Pet. App. 33a.

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[6] The *Chainsaw* plaintiffs alternatively argued that, even if equitable estoppel were a viable doctrine, it was inapplicable in this case because Creative Artists and McConaughey had no "special relationship to the distribution agreement signatories" and "no role in carrying out the agreement's obligations." Pet. App. 5a.

REASONS FOR GRANTING THE WRIT

Arbitration in the federal courts is a creature of statute, not of the historic equity powers of federal courts. This Court has repeatedly emphasized the contract-based nature of arbitration under the Federal Arbitration Act. *See, e.g., First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) ("arbitration is simply a matter of contract between the parties").

Yet, in conflict with the contract law principles this Court recognized in decisions such as *First Options*, a contrary doctrine has taken root in the lower federal courts. Increasingly, using a variety of "indeterminate" formulations, the courts are embracing a rule that judicial equity may compel arbitration even when the Federal Arbitration Act by its terms does not. The issue raised in this case – in which equity has been used to force contract signatories to arbitrate their legal claims against non-signatories – is important to the administration of justice in the federal courts and the administration of the Federal Arbitration Act.

I. The Fifth Circuit's discretionary "intertwined" claims theory of arbitrability conflicts with this Court's rejection of the discretionary "intertwined" claims theory in *Dean Witter*.

This Court has been clear and definite in the rules it has established for administration and enforcement of the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA"). "[I]t is a way to resolve those disputes – but only those disputes – that the parties have agreed to submit to arbitration."

First Options, 514 U.S. at 943. The Court has explained that the FAA sets firm bounds on the district courts:

> By its terms, the Act leaves *no place for the exercise of discretion by a district court.*

Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985) (emphasis added). From this it follows that the FAA is not a free-ranging mandate to arbitrate all claims but instead "merely the enforcement – upon the motion of one of the parties – of privately negotiated arbitration agreements." *Id.* at 219.

The Fifth Circuit's equitable discretion overlay on the FAA, and the opinions from the three other circuits from which it drew inspiration, have introduced a discretionary element into the rules for when arbitration is required. The equitable discretion doctrine has moved the lower courts from one rejected extreme to another. In *Dean Witter*, the Court considered and rejected an earlier incarnation of the "doctrine of intertwining" under the FAA. Under this "intertwining" doctrine, when presented with arbitrable and non-arbitrable claims, a district court could exercise its "discretion" to deny arbitration and instead try all the claims together. 470 U.S. at 216. The Court found the doctrine and its discretionary foundation inconsistent with the FAA. Consequently, it removed that "doctrine of intertwining" from federal arbitration law.

Now, another "doctrine of intertwining" is taking root in the circuit courts, this one at the other end of the spectrum, pushing cases into arbitration instead of keeping them in court. As with its discarded predecessor, this new "doctrine of intertwining" is based on the fundamentally flawed concept of district court "discretion" to

blur the clear lines established in the FAA. The Fifth Circuit's decision in this case is the furthest extension yet of that rejected doctrine.

By re-importing the discretionary doctrine of "intertwined" claims into federal arbitration law, the Fifth Circuit has moved to the head of a group of lower courts straying from the ruling in *Dean Witter* and its tethering of the FAA to consensual, private agreements. It does not matter that, this time, the courts are using non-statutory discretion to force arbitration in the absence of contractual agreement between the parties, whereas before *Dean Witter* that non-statutory discretion was being used to deny arbitration to parties who had contractually agreed otherwise. The core FAA requirement remains the same. Discretionary additions or subtractions to or from it in the name of equity and fairness, using such amorphous doctrines as "intertwined" claims, have no place under the statute and its contract law grounding. That the Fifth Circuit held otherwise in this case puts it into conflict with this Court's FAA precedents, and *Dean Witter* in particular, and the Court should take this case to end the conflict.

II. It is important to administration of the Federal Arbitration Act and to the administration of justice in the federal courts that the confusion created by the lower courts' development of supra-contractual equitable rules compelling arbitration be halted.

The central problem with the Fifth Circuit's decision is its loosening of federal arbitration law from its moorings in comparatively well-settled state and federal

contract law doctrines. Instead of this Congressionally required firm footing, the Fifth Circuit and the courts whose broadly stated doctrines it tried to apply have substituted the uncertainty of equitable discretion.

This discretionary element, expressly grounded in the equitable powers of the judiciary instead of the statutory directives of Congress, threatens to extinguish the rights of many parties in a wide variety of settings to an adjudication of their claims by federal judges and juries.[7] Under the burgeoning equitable doctrine, plaintiffs whose claims are "intertwined with" a contract containing an arbitration clause will have to forego their right to a federal judge and jury and instead submit to arbitration, even though the party forcing arbitration is not in any contractual relation with the plaintiffs. This threatens widespread denial of both the right to an Article III judge in cases where jurisdiction otherwise properly resides in the federal district courts and the right to a jury trial under the Seventh Amendment.

In this case, for example, the *Chainsaw* plaintiffs had properly demanded trial by jury, and it became a federal constitutional right under the Seventh Amendment once the case was removed to federal court on diversity grounds. *See, e.g., Crowell v. Benson*, 285 U.S. 22, 51 (1932) ("[o]n the common-law side of the federal courts, the aid of juries . . . is required by the Constitution itself").

Yet, that right has been lost through the lower courts' invocation of the equitable estoppel doctrine to force the

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[7] The FAA applies in diversity cases. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

common law tort action to a California "Rent-A-Judge" in a non-jury proceeding. Albeit in a different setting, this Court has instructed lower courts that, because the right to jury trial is a constitutional one, their equitable discretion "is very narrowly limited and must, *whenever possible*, be examined to preserve jury trial." *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510 (1959) (emphasis added) (concerning whether a legal or equitable issue should be tried first).

Despite the doctrine's threat of widespread and regular diminution of well-settled rights to judge and jury, the Eleventh Circuit,[8] the Seventh Circuit,[9] and now the Fifth Circuit in this case have endorsed the equitable discretion doctrine for compelling arbitration based on inquiries into how intertwined a claim against a non-signatory is to a contract containing an arbitration agreement. The fact that the doctrine is "amorphous" and "indeterminate" makes it particularly malleable and, therefore, particularly resistant to effective appellate supervision and oversight. Similarly, its malleability opens the courts to overly creative inquiries into what "intertwining" is.[10]

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[8] *Sunkist*, 10 F.3d 753, *McBro*, 741 F.2d 342, and *MS Dealer*, 177 F.3d 942.

[9] *Hughes Masonry Co. v. Greater Clark County School Bldg. Corp.*, 659 F.2d 836 (7th Cir. 1981).

[10] This case exemplifies the problem. The Fifth Circuit justified its "intertwined" conclusion by determining that TriStar is effectively a defendant in the current action. Pet. App. 13a. It reasoned that proving the tortious interference claim would require proof first that the *Chainsaw* producers' contract with TriStar was breached by TriStar. Pet. App. 11a. This is wrong. The *Chainsaw* plaintiffs can establish their claim of

For these reasons, this case presents an important question under federal arbitration law and for broader concerns of the administration of justice in the federal judicial system. Just as the Court in *Dean Witter* redirected the three federal circuits whose arbitration theories had strayed beyond the confines of the FAA, so should the Court in this case redirect the three circuits who again are straying from the FAA, using the same theory but moving into a different forbidden field of equitable discretion in federal arbitration law.

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tortious interference by Creative Artists and McConaughey without proving a consequent *breach*. They only have to prove that Creative Artists *interfered* with TriStar's contractual performance in a way that harmed them. *See generally* 2 Harper, James & Gray, THE LAW OF TORTS § 6.9, at 322 (2nd ed. 1986) ("[p]rotection is afforded the interest in contractual relations against harms other than inducement of breach").

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-51016

CHARLES O. GRIGSON, as Trustee for "The Texas Chainsaw Massacre"; RIVER CITY FILMS, INC.; ULTRA MUCHOS, INC.,

Plaintiffs-Appellants,

versus

CREATIVE ARTISTS AGENCY, L.L.C.; MATTHEW DAVID McCONAUGHEY,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas

(Filed April 24, 2000)

Before DUHÉ, BARKSDALE, and DENNIS, Circuit Judges.

RHESA HAWKINS BARKSDALE, Circuit Judge:

Solely at issue is whether the district court abused its discretion by applying equitable estoppel to compel arbitration for an action centered on tortious interference with a contract with an arbitration clause, brought by signatories to the contract against non-signatories, the court holding that, because this action is intertwined with, and dependent upon, that contract, its arbitration agreement should be given effect. We **AFFIRM**.

I.

"Return of the Texas Chain Saw Massacre" (the movie) was filmed in 1993-94; then "obscure actors" Matthew McConaughey and Renee Zellweger acted in it. The movie was produced by Ultra Muchos, Inc., and River City Films, Inc. The trustee for the movie's owners is Charles Grigson.

In October 1995, Ultra Muchos and River City entered into a distribution agreement with Columbia TriStar Home Video, Inc. It was given exclusive distribution rights and complete discretion on how to exercise them; the producers were to receive a percentage of the movie's gross revenue. And, by separate, earlier agreement, the owners were to receive a portion of the producers' percentage.

In the period post-acting in the movie and prior to the fall of 1996, McConaughey signed an agency contract with Creative Artists Agency, L.L.C. The movie's distribution was delayed by TriStar to take advantage of Zellweger and McConaughey's success in subsequent movies. Subsequently, however, TriStar gave the movie only a limited distribution.

In district court in mid-1997, Grigson, as trustee, sued Ultra Muchos, River City, and TriStar for breach of the distribution agreement. But, Grigson quickly and voluntarily had the action dismissed that fall, when TriStar sought to enforce the distribution agreement's arbitration clause, which contains a forum selection provision (Los Angeles County, California).

In late 1997, a few months after the voluntary dismissal of the first action, Grigson, *now joined by Ultra Muchos and River City*, filed this action in state court against McConaughey and Creative Artists (Defendants) for, *inter alia*, tortious interference with the distribution agreement, claiming that such interference occurred between McConaughey's signing with Creative Artists and the movie's limited distribution. In this regard, Defendants allegedly pressured TriStar to limit the release because they viewed it as an improper exploitation of McConaughey's success post-acting in the movie.

After the action was removed to federal court on the basis of diversity of citizenship, Defendants, although non-signatories to the distribution agreement, moved to compel arbitration under the agreement. The same district court that had permitted the voluntary dismissal of Grigson's first action ruled that Grigson, Ultra Muchos, and River City (Appellants) were equitably estopped from relying upon Defendants' being non-signatories. This was based upon holding that, because the claims are so intertwined with, and dependent upon, the distribution agreement, its arbitration clause should be given effect. Accordingly, in the light of the forum selection provision in the arbitration clause, the court dismissed the action so that the parties could proceed in the mandated forum (Los Angeles County, California).

II.

Arbitration is favored in the law. See ***Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.***, 460 U.S. 1, 24-25 (1983). Accordingly, parties to such agreements cannot

avoid them by casting their claims in tort, rather than in contract. *See e.g.*, ***Acevedo Maldonado v. PPG Indus., Inc.***, 514 F.2d 614, 616 (1st Cir. 1975). Likewise, proceedings against parties and non-parties to the arbitration agreement are stayed pending the outcome of arbitration, when the action against the non-party is dependent upon interpretation of the underlying contract. *See* ***Subway Equip. Leasing Corp. v. Forte***, 169 F.3d 324, 329 (5th Cir. 1999). Similarly, as discussed *infra*, in certain limited instances, pursuant to an equitable estoppel doctrine, a non-signatory-to-an-arbitration-agreement-defendant can nevertheless compel arbitration against a signatory-plaintiff.

In the distribution agreement, Ultra Muchos, River City, and TriStar agreed

> that any dispute or controversy relating to any of the matters referred to in clauses (d)(i), (ii), or (iii), above, shall be decided by a Rent-A-Judge, mutually selected by the parties (or, if they cannot agree, by the Presiding Judge of the Los Angeles Superior Court) appointed in accordance with California Code of Civil Procedure Section 638, sitting without a jury, in Los Angeles County California, and the Parties hereby submit to the jurisdiction of such court.

The parties to this action agree that this procedure is the equivalent of arbitration, which would be subject to the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* The clauses referenced in the arbitration provision concern

> (i) the validity and interpretation of this agreement, (ii) the performance by the Parties of their respective obligations hereunder, and (iii) all

> other causes of action (whether sounding in contract or in tort) arising out of or relating to this Agreement. . . .

Because the owners seek compensation through the distribution agreement, Grigson admits that he is a third party beneficiary of that agreement; and that, therefore, he is required, as are the signatory-producers, to arbitrate with TriStar all disputes concerning that agreement. Appellants contend, however, that they are *not* required to arbitrate with Defendants, because they are *not* parties to the distribution agreement; and because, in the alternative, Defendants do not fall within what Appellants view as the quite limited bases for application of equitable estoppel to compel arbitration: either a special relationship to the distribution agreement signatories, or a role in carrying out the agreement's obligations. Creative Artists and McConaughey counter that, because the charged tortious interference is intertwined with the distribution agreement, they are entitled, through application of equitable estoppel, to compel arbitration.

This is an issue of first impression for our circuit. Other circuits have, in a few instances, allowed a nonsignatory to a contract with an arbitration clause to compel arbitration under an equitable estoppel theory, including when the action is intertwined with, and dependent upon, that contract. *E.g.*, ***Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.***, 10 F.3d 753, 757 (11th Cir. 1993), *cert. denied*, 513 U.S. 869 (1994); ***Hughes Masonry Co., Inc. v. Greater Clark County Sch. Bldg. Corp.***, 659 F.2d 836, 841 n.9 (7th Cir. 1981).

The Eleventh Circuit has taken the lead in applying equitable estoppel under the intertwined-claims basis. *See*

also ***McBro Planning & Dev. Co. v. Triangle Elec. Constr. Co.***, 741 F.2d 342 (11th Cir. 1984). The test, which rejects the narrow strictures urged by Appellants, *see* ***Sunkist***, 10 F.3d at 757-58, is framed nicely by that circuit in ***MS Dealer Serv. Corp. v. Franklin***, 177 F.3d 942, 947 (11th Cir. 1999):

> Existing case law demonstrates that equitable estoppel allows a nonsignatory to compel arbitration in two different circumstances. *First, equitable estoppel applies when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the nonsignatory.* When each of a signatory's claims against a nonsignatory makes reference to or presumes the existence of the written agreement, the signatory's claims arise out of and relate directly to the written agreement, and arbitration is appropriate. *Second, application of equitable estoppel is warranted when the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract. Otherwise the arbitration proceedings between the two signatories would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted.*

(Internal citations and quotation marks omitted; emphasis added.)

We agree with the intertwined-claims test formulated by the Eleventh Circuit. Each case, of course, turns on its facts. Such equitable estoppel is much more readily applicable when the case presents both independent bases

advanced by the Eleventh Circuit for applying the intertwined-claims doctrine. That is the situation here. The linchpin for equitable estoppel is equity – fairness. For the case at hand, to not apply this intertwined-claims basis to compel arbitration would fly in the face of fairness.

For the above-quoted statement from ***MS Dealer Serv. Corp.*** that equitable estoppel is applied in order to fulfill federal pro-arbitration policy, the Eleventh Circuit quoted from our court's decision in ***Sam Reisfeld & Son Import Co. v. S. A. Eteco***, 530 F.2d 679, 681 (5th Cir. 1976), which used an intertwined-claims rationale for staying judicial proceedings against two defendants, with links to a third, pending arbitration with plaintiff. Unlike third-defendant, the other two were *not* signatories to the arbitration agreement with plaintiff. Our court held, accordingly, that the district court had "discretion" to stay the judicial proceedings as to all three defendants, even though, as noted, two were *not* parties to the arbitration agreement: "[t]he charges against these two defendants were based on the same operative facts and were inherently inseparable from the claims against" third-defendant, a signatory to the agreement. ***Id.*** Accordingly, our court concluded that the district court had *not* abused its discretion.

Although ***Reisfeld*** does *not* apply equitable estoppel *per se*, its *ratio decidendi* comports with that for application of that doctrine to allow a defendant non-signatory to an arbitration agreement to compel arbitration with a plaintiff-signatory. In short, although arbitration is a matter of contract and cannot, in general, be required for a matter

involving an arbitration agreement non-signatory, a signatory to that agreement *cannot*, in those instances described in ***MS Dealer Serv. Corp.***, "have it both ways": it cannot, on the one hand, seek to hold the non-signatory liable pursuant to duties imposed by the agreement, which contains an arbitration provision, but, on the other hand, deny arbitration's applicability because the defendant is a non-signatory. ***MS Dealer Serv. Corp.***, 177 F.3d at 947; ***Hughes Masonry Co.***, 659 F.2d at 838-39. Again, to allow such inconsistent positions would be inequitable, to say the least.

Moreover, as noted, it would be especially inequitable where, as here, a signatory non-defendant is charged with interdependent and concerted misconduct with a non-signatory defendant. In such instances, that signatory, in essence, becomes a party, with resulting loss, *inter alia*, of time and money because of its required participation in the proceeding. Concomitantly, detrimental reliance by that signatory *cannot* be denied: it and the signatory-plaintiff had agreed to arbitration in lieu of litigation (generally far more costly in terms of time and expense); but, the plaintiff is seeking to avoid that agreement by bringing the action against a non-signatory charged with acting in concert with that non-defendant signatory. Of course, detrimental reliance is one of the elements for the usual application of equitable estoppel. *E.g.*, ***In re Coastal Plains***, 179 F.3d 197, 207 (5th Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3311 (U.S. 1 Oct. 1999) (No. 99-756).

Accordingly, whether to utilize equitable estoppel in this fashion is within the district court's discretion; we review to determine only whether it has been abused.

E.g., ***Scholle Corp. v. Blackhawk Molding Co.***, 133 F.3d 1469, 1471 (Fed. Cir. 1998); ***Hoefler v. Babbitt***, 139 F.3d 726, 727 (9th Cir.), *cert. denied*, ___ U.S. ___, 119 S. Ct. 70 (1998). *See* ***In Re Coastal Plains, Inc.***, 179 F.3d at 205 (judicial estoppel). To constitute an abuse of discretion, the district court's decision must be either premised on an application of the law that is erroneous, or on an assessment of the evidence that is clearly erroneous. ***Id.***

The district court did *not* abuse its discretion by concluding "that Plaintiffs' claims are so intertwined with and dependent upon the Distribution Agreement that the arbitration agreement within the Distribution Agreement should be given effect". This conclusion is compelled by comparing the complaint (the operative facts for purposes of the motion to compel arbitration) with the distribution agreement (an exhibit to the complaint). This is quickly and amply demonstrated with but a few examples.

The distribution agreement is *not* the only contract for which tortious interference is claimed. Creative Artists is also charged with such interference with McConaughey's actor's contract for the movie (another exhibit to the complaint); he is charged with breach of that contract. Among other things, he was required by that actor's contract to allow use of "his name and photographs . . . for commercial and advertising purposes".

The complaint uses that specific requirement in the actor's contract in describing how, for the theatrical release (as defined in the distribution agreement) mandated by the distribution agreement, TriStar

> had planned to distribute Chainsaw movie posters prominently featuring the likeness and name of McConaughey and, in fact, had printed posters reflecting this plan. Creative Artists, acting for McConaughey, contacted Columbia Tristar and successfully pressured it to retreat from its plan for the posters on the grounds that McConaughey's fame should not be exploited in such a manner in connection with the Chainsaw movie.

This is but part of the charged interference. In addition, the complaint alleges that the theatrical release was delayed initially to take advantage of Zellweger's post-movie success in another movie, *also released by TriStar*; that the plan changed to take advantage of both actors' success; that Creative Artists, on behalf of McConaughey, "pressured" TriStar to *not* make a major release of the movie and, instead, to make only a limited one, to Appellants' great financial detriment; and that, because of Defendants' actions, *"TriStar failed to exercise its good faith judgment in promoting, exploiting, and distributing" the movie*. (Emphasis added.)

As is obvious from the foregoing, and as the district court concluded, these allegations and claims are intertwined with, and dependent upon, the distribution agreement. In addition to Appellants relying on the terms of the agreement in asserting their claims, TriStar and Defendants are charged with interdependent and concerted misconduct.

The distribution agreement, in describing the movie, lists Zellweger and two others as "starring" in it; *McConaughey is not so listed*. All rights to the movie are

given to TriStar; and, subject to it making a required minimum expenditure in connection with the theatrical release, TriStar has "*absolute discretion* concerning the exploitation of the [movie] in any and all media". (Emphasis added.)

In that provision, which obviously lies at the heart of this action, Appellants

> agree[d] that the *good faith judgment* of [TriStar] regarding any matter affecting the exploitation of the [movie] shall be binding and conclusive upon [Appellants] ([TriStar] shall make the determination, *within its sole discretion*, whether or not to release the [movie] in a given media and/or in a given territory).

(Emphasis added.) "Territory" includes, with some exceptions, "[t]he entire universe", while "media" includes, but is *not* limited to, movie theaters.

And, as noted, the distribution agreement's arbitration clause pertains, *inter alia*, to the "interpretation of [the distribution] agreement, . . . the performance by the Parties of their respective obligations [there]under, and . . . all other causes of action (whether sounding in contract *or in tort*) arising out of *or relating to* this Agreement". (Emphasis added.)

In short, the scope of the distribution, the "discretion", both "absolute" and "sole", vested in TriStar, and its "good faith judgment" are at the center of this dispute. Among other things, TriStar is charged with, as a result of the claimed interference ("pressure"), *not* using its "good faith judgment". Although *not* sued (an obvious attempt to make an end-run around the arbitration clause, as

discussed *infra*), TriStar nevertheless will be involved extensively – and, no doubt, quite expensively – in this dispute, including whether it performed properly under the distribution agreement.

As stated, the foregoing are but a few examples of the intertwining of the claims with the distribution agreement, including the claimed concerted actions by Defendants (non-signatories), with TriStar, a signatory. How possible damages might be computed, in the light of the detailed "accounting" provisions of the agreement, is but another example.

This action is quite similar to Grigson's first action – against TriStar, discussed below. After quickly instituting a voluntary dismissal of that action, when TriStar moved to compel arbitration, Appellants brought this one against McConaughey and Creative Artists, non-signatories to the distribution agreement, for, *inter alia*, interfering with that agreement. As noted, this is a quite obvious, if not blatant, attempt to bypass the agreement's arbitration clause.

In Grigson's first action, against the two producers (who joined Grigson in this second action) and TriStar, Grigson charged TriStar, as it is also alleged to have done in the action at hand, with "breach[ing] the 'good faith judgment' clause . . . of the distribution agreement". In the alternative, TriStar was charged with fraud. And, the producers, charged with failing to exploit the movie in breach of their contract with the owners, cross-claimed against TriStar. One of the exhibits to the complaint is a 7 January 1997 letter to TriStar from one of the persons owning rights to the movie, in which he stated that he

and another similarly-situated person (who had also directed the movie) were "very eager to know what [was] being done by [TriStar] to fully explore the financial possibilities of [the movie]", and then advised: "It goes without saying that [TriStar] has *absolute discretion* in making those determinations but this does not change my obligation to my investors to see that those decisions are based on what is best for this film". (Emphasis added.) When TriStar moved promptly to compel arbitration, the owners and cross-claim producers quickly folded their tents. The action, filed in district court on 9 June 1997, was dismissed without prejudice on 10 September 1997.

The action at hand was filed two and one-half months later, on 22 December 1997. This time, it was filed in state court. *TriStar was no longer a defendant.* Its earlier-charged failure to use its contractually required "good faith judgment" was now alleged to have been caused by "pressure" from the new defendants, Creative Artists and McConaughey. In reality, the two actions are the same. *In essence, TriStar is a defendant.* Each action turns on the meaning of the distribution agreement's numerous – often intricate – provisions, which are unique to the film industry, and on TriStar's conduct in relation to that agreement.

Arguably, the inconsistent positions by Grigson and the two producers in the first and second actions bump up on, if indeed do not satisfy, the prerequisites for judicial estoppel. *See* ***In re Coastal Plains***, 179 F.3d at 205-07 (purpose of doctrine is to prevent parties "playing fast and loose with the courts"). Judicial estoppel is *not* raised; but, because that doctrine protects the judicial system, ***id.***, we can apply it *sua sponte* in certain instances.

See ***United States For Use of Am. Bank v. C.I.T. Constr. Inc.***, 944 F.2d 253, 258 (5th Cir. 1991).

In any event, comparison of the two actions demonstrates, quite vividly, why the district court, *which presided over both actions*, did *not* abuse its discretion in compelling arbitration in the second, by applying the equitable estoppel doctrine crafted for such situations. The claims are intertwined with, and dependent upon, the distribution agreement, including, but *not* limited to, Defendants (non-signatories) and TriStar (non-defendant signatory) being charged with interdependent and concerted misconduct. Indeed, this action is the quintessential situation for when the doctrine should be applied.

III.

For the foregoing reasons, the judgment is ***AFFIRMED***.

DENNIS, Circuit Judge, dissenting:

"[N]early anything can be called estoppel. When a lawyer or a judge does not know what other name to give for his decision to decide a case in a certain way, he says there is an estoppel."[1] The trouble with that kind of use of the estoppel label by the majority in this case making

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[1] Statement of Samuel Williston, 4 ALI Proceedings 61, 89-90 (1926) (quoted by 4 RICHARD A. LORD, WILLISTON ON CONTRACTS § 8.5, at 73 (4th ed. 1992)) [hereinafter WILLISTON].

circuit precedent is that it will seriously hinder this court in upholding the basic principle that a person has a right to a court's decision about the merits of a dispute unless he has agreed to submit it to arbitration. Because the majority decision conflicts with the Supreme Court's recent emphatic affirmations of that principle, and the precedents of this circuit, I respectfully dissent.

In *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), the Supreme Court reaffirmed important contractual arbitration principles: (1) *Contract Governs Whether A Dispute Is Arbitrable Or Litigable*: "[A]rbitration is simply a matter of contract between the parties; it is a way to resolve those disputes – but only those disputes – that the parties have agreed to submit to arbitration."[2] "[A] party who has not agreed to arbitrate will normally have a right to a court's decision about the merits of its dispute[.]"[3] (2) *State-Law Contract Principles Govern Standing And Obligation To Arbitrate*: "When deciding whether the parties agreed to arbitrate a certain matter . . . courts generally . . . should apply ordinary state-law principles that govern the formation of contracts."[4] (3) *Parity Of*

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[2] *First Options*, 514 U.S. at 943 (citing *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 649 (1986); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57-58 and n.9 (1995); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 271 (1995); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 , 625-26 (1985)).

[3] *Id.* at 942.

[4] *Id.* at 944 (citing *Mastrobuono*, 514 U.S. at 62-63 & n.9; *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 475-76 (1989); *Perry v. Thomas*, 482 U.S. 483, 492-93 n.9 (1987); 1 GABRIEL M. WILNER, DOMKE COMM ARBITRATION § 4:04, at 15 (Rev. Ed. 1993)) [hereinafter DOMKE].

Contractual Enforcement:\"After all, the basic objective in this area is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes,[5] but to ensure that commercial arbitration agreements, like other contracts '"are enforced according to their terms," '[6] and according to the intentions of the parties[.]"[7] (4)*Standard of Review*: "[R]eview of . . . a district court decision confirming an arbitration award on the ground that the parties agreed to submit their dispute to arbitration, should proceed like review of any other district court decision finding an agreement between parties, e.g., accepting findings of fact that are not 'clearly erroneous' but deciding questions of law de novo."[8] (Internal citations placed in footnotes).

Air Line Pilots Ass'n v. Miller, 523 U.S. 866 (1998), strongly confirmed these principles in holding that non-union pilots challenging the agency fee collected by the union could not be required to arbitrate their challenges because they had not agreed to do so: "Ordinarily, 'arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.' " *Id.* at 876 (citing *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582

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[5] *Id.* at 947 (citing *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-20 (1985)).

[6] *Id.* (citing *Mastrobuono*, 513 U.S. at 54 (quoting *Volt Information Sciences*, 489 U.S. at 479)).

[7] *Id.* (citing *Mitsubishi Motors*, 473 U.S. at 626; *Allied-Bruce*, 513 U.S. at 271).

[8] *First Options*, 514 U.S. at 947-48 (citing *Kaplan v. First Options of Chicago, Inc.*, 19 F.3d 1503, 1509 (3d Cir. 1994)).

(1960)); *see also First Options*, 514 U.S. at 942 ("a party who has not agreed to arbitrate will normally have a right to a court's decision about the merits of its dispute").

As a general rule, an arbitration clause cannot be invoked by a non-party to the arbitration contract, and only parties to the arbitration agreement are bound to arbitrate. *See* 1 GABRIEL M. WILNER, DOMKE COMM ARBITRATION § 10:00, at 1 (Rev. Ed. 1993) (citing, *inter alia*, *Dayhoff Inc. v. H.J. Heinz Co.*, 86 F.3d 1287 (3d Cir. 1996); *Gingiss Int'l v. Bormet*, 58 F.3d 328 (7th Cir. 1995); *United States v. Harkins Builders, Inc.*, 45 F.3d 830 (4th Cir. 1995)) [hereinafter DOMKE]. The federal policy favoring arbitration is strong, but it alone cannot authorize a non-party to invoke arbitration or require a non-signatory to arbitrate. *See id.* Nonetheless, a non-signatory may be bound by or acquire rights under an arbitration agreement under ordinary state-law principles of agency or contract. *Id.*; *First Options*, 514 U.S. at 944.

Courts have recognized a number of theories arising out of common law principles of contract and agency law under which non-signatories may be bound to the arbitration agreements of others. For example, 1) incorporation by reference; 2) assumption by conduct; 3) agency; 4) veil-piercing/alter ego; and 5) estoppel. *See Thomson-CSF, S.A. v. American Arbitration Ass'n*, 64 F.3d 773, 776-80 (2d Cir. 1995) (citing as examples *Matter of Arbitration Between Keystone Shipping Co. & Texport Oil Co.*, 782 F.Supp. 28, 31 (S.D.N.Y. 1992) (incorporation by bill of lading); *Gvozdenovic v. United Air Lines, Inc.*, 933 F.2d 1100, 1105 (2d Cir.) (assumption by conduct), *cert. denied*, 502 U.S. 910 (1991); *Interbras Cayman Co. v. Orient Victory Shipping Co., S.A.*, 663 F.2d 4, 6-7 (2d Cir. 1981) (agency); *Carte*

Blanche (Singapore) Pte., Ltd. v. Diners Club Int'l. Inc., 2 F.3d 24, 26 (2d Cir. 1993) (veil-piercing); *Wm. Passalacqua Builders, Inc. v. Resnick Developers S., Inc.*, 933 F.2d 131, 138-39 (2d Cir. 1991) (same); *Deloitte Noraudit A/S v. Deloitte Haskins & Sells, U.S.*, 9 F.3d 1060, 1064 (2d Cir. 1993) (non-signatory bound to arbitration contract by estoppel)).

In theory, under ordinary state-law principles of equitable and promissory estoppel, a non-party to a contract containing an arbitration clause may invoke the clause and compel a signatory party to arbitrate when the signatory reasonably should have expected that, because of his statements or conduct, the non-signatory would be induced to rely justifiably on the contract and would be injured thereby if the signatory refused to recognize the non-signatory's rights or entitlements with respect to the contract.[9] However, there have been few, if any, cases in which a non-signatory has successfully invoked an arbitration clause against a party signatory to the contract under ordinary equitable or promissory estoppel principles. In a relatively few arbitration cases, a non-signatory to the arbitration agreement has been allowed to compel arbitration under a spurious estoppel theory when the peculiar integrated or interlocking circumstances of the

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[9] *See, e.g.*, WILLISTON, *supra* note 1, §§ 8.3 and 8.4; RESTATEMENT (SECOND) OF CONTRACTS § 90(1) ("A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires."); *cf.* 1 DOMKE § 10.07, at 18.

parties' relationships, related contracts, contractually assigned responsibilities, conduct, and disputes would allow the inference that the signatory and non-signatory parties have by an agreement implied in fact become bound reciprocally by the arbitration clause or the contract of which it is a part. *See MS Dealer Service Corp. v. Franklin*, 177 F.3d 942 (11th Cir. 1999); *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753 (11th Cir.), *cert. denied*, 513 U.S. 869 (1994); *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315 (4th Cir. 1988); *McBro Planning & Development Co. v. Triangle Elec. Const. Co., Inc.*, 741 F.2d 342 (11th Cir. 1984); *Hughes Masonry Co., Inc. v. Greater Clark County School Bldg. Corp.*, 659 F.2d 836 (7th Cir. 1981); *cf.* 1 DOMKE § 10:07, at 18-20.

In truth, however, the bases of facts and reasoning upon which the courts in those cases ordered a signatory to an arbitration agreement to arbitrate a dispute with a non-signatory have the earmarks of a foundation for an agreement implied in fact rather than an ordinary equitable or promissory estoppel. In the courts' opinions the non-signatory is said to have standing to compel a signatory to arbitrate, rather than litigate, a justiciable claim against the non-signatory, if, in addition to other significant factors, there is a close relationship between signatory and non-signatory entities and the signatory's claim against the non-signatory is intertwined with an arbitrable dispute under the contract. However, the facts in those cases which made the relationships "close" and the claims "intertwined," viz., the disputants' voluntary and knowing formation of (and performance under) interlocking or integrated contracts, their bargained for exchanges of promises and/or performances between themselves

and others, and, in *Sunkist* and *J.J. Ryan*, the parent-subsidiary corporate relationship, indicate the existence of an implied in fact agreement rather than an ordinary equitable or promissory estoppel.

"An agreement implied in fact is 'founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding.' " *Hercules, Inc. v. United States*, 516 U.S. 417, 424 (1996) (quoting *Baltimore & Ohio R. Co. v. United States*, 261 U.S. 592, 597 (1923)).[10] The doctrine of equitable estoppel generally provides "that a representation of past or existing fact made to a party who relies upon it reasonably may not thereafter be denied by the party making the representation if permitting the denial would result in injury or damage to the party who so relies."[11] The widely accepted general statement of promissory estoppel, which developed against the backdrop of equitable estoppel, is set forth by RESTATEMENT (SECOND) OF CONTRACTS § 90(1): "A promise which the promisor should reasonably expect to induce action

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[10] *See* 1 WILLISTON § 1.5, at 18-20 (citing, *inter alia*, *Wood v. Ingram*, 275 S.W. 397 (Tex.Civ.App. 1925) (writ dism w.o.j.)), and stating: "The Restatement (Second) [Of Contracts §§ 4 & comment a; 91 & comment a]. . . . indicates that a promise may be stated in words or may be inferred wholly or partly from conduct. . . . a contract by conduct is, in essence, an implied in fact contract. . . . the Restatement, as well as the numerous cases, make the concept abundantly clear." *Id.* at 24-25; *see also* 4 WILLISTON §§ 8.3 and 8.4.

[11] 4 WILLISTON § 8.3, at 28-30 (citing, *inter alia*, *Morton v. Samuels*, 268 S.W.2d 490 (Tex.Civ.App. 1954, writ ref'd n.r.e.)).

or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires." In determining whether a person is bound either by an agreement implied in fact or by the ordinary principles of equitable or promissory estoppel, it should be kept in mind that "[j]ust as assent may be manifested by words or other conduct, sometimes including silence, so intention to make a promise may be manifested in language or by implication from other circumstances, including course of dealing or usage of trade or course of performance."[12] A brief review of *Hughes, McBro, Sunkist* and *MS Dealer* shows ample evidence of assents and promises that may have more appropriately warranted basing those decisions on agreements implied in fact, or perhaps on ordinary promissory estoppel, rather than upon the highly abstract new theory of an "estoppel" loosely based on "close" relationships, "intertwined" claims, and other variable factors.

The facts in *McBro* and *Hughes* were highly suggestive of an implied in fact agreement between the parties to be mutually bound by the contract containing the arbitration clause.[13] In each case a construction contractor

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[12] RESTATEMENT (SECOND) OF CONTRACTS § 4, comment a.

[13] See II IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW, § 18.2.3 (Supp. 1999) (analyzing the Eleventh Circuit cases of *McBro Planning & Development Co. v. Triangle Elec. Const. Co., Inc.*, 741 F.2d 342 (11th Cir. 1984) and acknowledging the opinion's heavy reliance on *Hughes Masonry Co. v. Greater Clark County Sch. Bldg. Corp.*, 659 F.2d 836 (7th Cir. 1981), the editors conclude: "It should be noted that the action estopping Triangle

entered a contract with the owner of the proposed facility containing an arbitration clause. The same contract designated a non-signatory party as construction manager and outlined the duties of the owner, construction contractor, construction manager, and, in one case, the architect, with respect to the construction project. The construction managers in both cases had not signed the owner-contractor agreement but had signed separate contracts containing similar arbitration clauses with either the owner or the owner's architect. By performing duties and accepting benefits under the interlocking and integrated system of construction contracts and relationships the contractors impliedly agreed to be bound to arbitrate disputes with the construction managers concerning the performance of the managers' duties assigned by and performed under the owner-contractor agreement, although the managers had only signed the related but separate contract documents between themselves and the owner or its architect.

In *Sunkist* a non-signatory parent corporation was granted standing to arbitrate disputes arising out of the performance of a contract containing an arbitration clause between the parent's wholly owned subsidiary and the

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was apparently its contracting with Hospital in the first place and performing under that contract. Thus the court could just as well have put the result in terms of consent. That is to say, Hospital and McBro could have reasonably understood from Triangle's contracting with the hospital with knowledge of the terms of the Hospital-McBro contract that Triangle was consenting to be bound by the arbitration clause. The decision is probably most useful in simply broadening out conceptions of consent, rather than in introducing any truly separate doctrine.").

other signatory to the contract. The court relied not only on the close relationships of the entities and the close resemblance of the arbitrable and litigable claims but also on a form of corporate veil piercing: " 'When the charges against a parent company and its subsidiary are based on the same facts and are inherently inseparable, a court may refer claims against the parent to arbitration even though the parent is not formally a party to the arbitration.' " *Sunkist*, 10 F.3d at 757 (quoting *J.J. Ryan*, 863 F.2d at 320-21). The Fourth Circuit in *J.J. Ryan* relied on the foregoing veil piercing language quoted from its opinion and merely noted in passing that the same result had been reached under a theory of equitable estoppel in *McBro*. *See J.J. Ryan*, 863 F.2d at 321.

In *MS Dealer*, Sharon Franklin agreed to purchase a car from Jim Burke Motors and signed a buyer's order with Burke. The buyer's order incorporated by reference a retail installment contract between Franklin and Burke which provided that Franklin was being charged $990.00 for a service contract under which MS Dealer Service Corporation (apparently designated by name in the buyer's order) agreed to provide services for Franklin's car. (The court of appeal's opinion suggests that MS Dealer entered an oral or written contract with Burke or Franklin or both to provide services for Franklin's car.) The buyer's order contained an arbitration clause which provided that "all disputes and controversies of every kind and nature between buyer and Jim Burke Motors, Inc. arising out of or in connection with the purchase of this vehicle will be resolved by arbitration." Also, in another passage, the buyer's order stated that "[a]ll disputes and controversies of every kind and nature

between the parties hereto arising out of or in connection with this contract" shall be submitted to arbitration. MS Dealer did not sign the buyer's order or the installment contract.

Franklin sued Burke and MS Dealer in state court claiming that MS Dealer improperly conspired and colluded with Burke and Chrysler Credit Corporation, the assignee of the retail installment contract, in a scheme to defraud her by imposing an excessive charge of $990.00 for the service contract and dividing the excess amount. Burke filed a motion in state court to compel Franklin to arbitrate, which was granted and resulted in an arbitration award in favor of Burke and a dismissal of the state suit against Burke. MS Dealer sued Franklin in federal district court to compel her to arbitrate her claims against it. The court of appeals reversed the district court's dismissal of MS Dealer's petition and granted the defendants' motion to stay the action and compel arbitration.

The *MS Dealer* court, in concluding that Franklin was equitably estopped from avoiding arbitration with MS Dealer, stated:

> It is important to note that Franklin's obligation to pay the $990.00 charge arose under the Buyers Order and that she specifically alleges that MS Dealer worked hand-in-hand with Jim Burke and Chrysler Credit Corporation in this alleged fraudulent scheme. Her 'allegations of such pre-arranged, collusive behavior establish [ ] that [her] claims against [MS Dealer are] intimately founded in and intertwined with the obligations imposed by the [Buyers Order].'

MS Dealer, 177 F.3d at 948 (quoting *Boyd v. Homes of Legend, Inc.*, 981 F.Supp. 1423, 1433 (M.D.Ala. 1997)).

As in *Hughes* and *McBro*, the circumstances of interlocking and integrated contracts would allow the inference that both Franklin and MS Dealer had agreed to arbitrate any dispute between them arising out of or connected with Franklin's purchase of the automobile. Indeed, the ambiguous buyer's order contract reasonably could be construed to include MS Dealer as one of the "parties hereto." Further, Franklin reasonably should have understood that MS Dealer agreed to provide the service contract in exchange for the compensation it was to receive under the buyer's order and the retail installment contract and would call upon her to arbitrate any dispute related to the formation or performance of the service contract. Moreover, because Franklin's allegations of Burke's fraudulent overcharging for the service contract was clearly an arbitrable dispute arising out of and connected with the purchase of the vehicle, MS Dealer's alleged conspiracy and collusion with Burke in the fraudulent overcharge was an essential part of the arbitrable dispute between Franklin and Burke.

Nevertheless, the Eleventh Circuit chose to use the spurious estoppel theory or label and, in justifying its decision, attempted to draw from the case some abstract "equitable estoppel" explanatory principles:

> First, equitable estoppel applies when the signatory to a written agreement containing an arbitration clause 'must rely on the terms of the written agreement in asserting [its] claims' against the non-signatory. *Sunkist Soft Drinks*, 10 F.3d at 757. When each of a signatory's claims

> against a non-signatory 'makes reference to' or 'presumes the existence of' the written agreement, the signatory's claims 'arise[ ] out of and relate[ ] directly to the [written] agreement,' and arbitration is appropriate. *Id.* at 758. Second, 'application of equitable estoppel is warranted – . . . when the signatory [to the contract containing the arbitration clause] raises allegations of . . . substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract.' *Boyd*, 981 F.Supp. at 1433.

MS Dealer, 177 F.3d at 947. The remainder of the *MS Dealer* opinion, however, in its painstaking analysis of the facts and reasoning based on all of the circumstances involved, indicates no intention that the foregoing principles should be applied as free-standing rules of law. The Eleventh Circuit concluded that Franklin was compelled to arbitrate her dispute with MS Dealer only after pointing out facts indicating that both parties had actually manifested their mutual assent to a bargain in which they exchanged promises of performances with each other and with Jim Burke Motors; that the buyer's order incorporating the arbitration clause and the retail installment contract, which incorporated the service contract with MS Dealer, were all parts of the bargain of which Franklin, MS Dealer, and Burke were aware or should have been aware before they entered the agreement; and that, if MS Dealer was a co-conspirator with Burke in defrauding Franklin as she alleged, her claim against MS Dealer was part of her dispute with Burke, with whom she was a co-signatory of the arbitration agreement. *See id.* at 947-49.

On the other hand, the Second Circuit, in *Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773 (2d Cir. 1995), refused to accept "[a]nything short of requiring a *full* showing of some accepted theory under agency or contract law" before compelling arbitration between a signatory and a non-signatory. *Id.* at 780. In *Thomson*, the court of appeals reversed the district court's order compelling a non-signatory parent corporation to arbitrate a dispute with a third party under an arbitration agreement signed by the parent's subsidiary corporation prior to the parent's acquisition of the subsidiary. The district court had determined that the claims of the third party, E & S, did not fall within any of the traditional theories for binding a non-signatory, but nevertheless ordered Thomson, the non-signatory, to arbitrate a dispute with E & S, applying a "hybrid approach" based on Thomson's conduct in voluntarily becoming an affiliate of its subsidiary, Rediffusion, on the degree of control Thomson exercised over Rediffusion, and on the interrelatedness of the issues. In so doing, the Second Circuit held, "the district court improperly extended the law of this Circuit and diluted the protections afforded nonsignatories by the 'ordinary principles of contract and agency.' A nonsignatory may not be bound to arbitrate except as dictated by some accepted theory under agency or contract law." *Id.* at 780 (quoting *McAllister Bros., Inc. v. A & S Transp. Co.*, 621 F.2d 519, 524 (2d Cir. 1980)) (internal citation omitted).

The *Thomson* court addressed a situation in which a signatory seeks to compel a non-signatory, the inverse of the pattern in *MS Dealer, Sunkist, J.J. Ryan, McBro* and

Hughes. Nonetheless, *Thomson* lends support to the conclusion that the *Hughes-McBro* line of cases lacked a valid basis in the ordinary principles of estoppel or veil-piercing for compelling the signatories to arbitrate with the non-signatories. Instead, as *Thomson* implicitly suggests, in *MS Dealer, McBro and Hughes*, the only valid basis for compelling the signatories to arbitrate with the non-signatories was that their knowing participation in the reticulated transactional arrangements, and their performance and conduct thereunder, allowed the inference that they agreed to be mutually bound by the contract including the arbitration clause. After taking *Sunkist, J.J. Ryan*, and *McBro* into account, the Second Circuit in *Thomson* distinguished them as inapposite to the case before it on several grounds, including: (1) when Thomson acquired Rediffusion as its subsidiary, Thomson explicitly disavowed any obligations under the working agreement, including the arbitration clause, between Rediffusion and E & S, *see Thomson*, 64 F.3d at 777; (2) "[v]eil piercing determinations are fact specific and 'differ[ ] with the circumstances of each case.' ", *Id.* at 777-78 (quoting *American Protein Corp. v. AB Volvo*, 844 F.2d 56, 60 (2d Cir.), *cert. denied*, 488 U.S. 852 (1988)); "E & S has not demonstrated that Thomson exerted the degree of control over Rediffusion necessary to justify piercing the corporate veil.", *Id.* at 778; (3) "Thomson . . . cannot be estopped from denying the existence of an arbitration clause to which it is a signatory because no such clause exists. At no point did Thomson indicate a willingness to arbitrate with E & S." *Id.* at 779; (4) "[t]he district court- . . . improperly extended the limited theories upon which this Court is willing to enforce an arbitration agreement

against a non-signatory. The district court's hybrid approach dilutes the safeguards afforded to a non-signatory by the 'ordinary principles of contract and agency' and fails to adequately protect parent companies, the subsidiaries of which have entered into arbitration agreements." *Id.* at 780.

The Second Circuit's adherence to "ordinary principles of contract and agency" in *Thomson* was consistent with the Supreme Court's admonition and example it set in *First Options* as to the application of ordinary state law principles of contracts to determine whether the parties agreed to arbitrate a certain matter. As mentioned above, the Court in *First Options* instructed:

> When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally (though with a qualification we discuss below) should apply ordinary state-law principles that govern the formation of contracts. . . . The relevant state law here, for example, would require the court to see whether the parties objectively revealed an intent to submit the arbitrability issue to arbitration. [citing an Illinois case for the law of the state whose law governed the workout agreement and a Pennsylvania case for the law of the state where the Kaplans objected to arbitrability]

First Options, 514 U.S. at 944 (internal citations omitted).

The plaintiffs brought the present suit against Creative Artists and McConaughey in a Texas state court asserting a Texas state tort claim for interference with contract. Thus, the ordinary state law principles of Texas governing the formation of contracts should be applied to

determine whether the plaintiffs agreed to arbitrate this matter with the defendants. The trial court acknowledged that neither of the defendants were signatories to the contract between the plaintiffs and Columbia TriStar. The trial court did not find that the plaintiffs and defendants had entered an agreement, express or implied in fact, to arbitrate the tortious interference with contract claim. Instead, the trial court determined that the plaintiffs were bound by equitable estoppel to arbitrate the matter with the defendants. On appeal the defendants also rely solely on equitable estoppel.

All American jurisdictions adopt and apply a theory of promissory estoppel grounded in section 90 of the contracts restatements. 3 ERIC MILLS HOLMES, CORBIN ON CONTRACTS, § 8.12, at 58 (Joseph M. Perillo ed., rev. ed. 1997) [hereinafter CORBIN]. This theory is an outgrowth of and includes the earlier doctrine of equitable estoppel. *See* 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 2.19, at 137-40 (1990 and Supp. 1998); 3 CORBIN § 8.11, at 46. Recent Texas decisions cite and apply the second Restatement § 90. *See* 3 CORBIN § 8.12, at 188 (citing *City of Beaumont v. Excavators & Contractors, Inc.*, 870 S.W.2d 123, 136, 154 (Tex.App. 1993, writ denied) (citing RESTATEMENT (SECOND) OF CONTRACTS § 90); *Traco, Inc. v. Arrow Glass Co., Inc.*, 814 S.W.2d 186, 190 (Tex.App. 1991, writ denied); *First State Bank in Archer City v. Schwartz Co.*, 687 S.W.2d 453 (Tex.App.1985, writ ref'd n.r.e.)). The current three-prong Texas promissory estoppel requisites, however, were fashioned from the first Restatement in the 1960s: (1) a promise, (2) foreseeability of reliance by the promisor, and (3) substantial reliance by the promisee to its detriment. *Id.* (citing, *e.g.*, *English v. Fischer*, 660 S.W.2d

521, 524 (Tex. 1983); *Randle v. NCNB Texas Nat'l Bank*, 812 S.W.2d 381 (Tex.App. 1991); *Aubrey v. W.O. Workman*, 384 S.W.2d 389, 395 (Tex.Civ.App. 1964, writ ref'd n.r.e.)). Later decisions added: (4) reliance on the promise must be reasonable, and (5) the promise will be enforced if necessary to avoid injustice. *Id.* (citing Texas cases).

Applying the Texas state-law principles governing the formation of contracts and promissory estoppel, it is evident that the plaintiffs should not be compelled to arbitrate their tortious interference with contract claim with Creative Artists and McConaughey. There was no agreement between these parties, express or implied, to arbitrate that dispute. None of the requisites of section 90 of the RESTATEMENT (SECOND) OF CONTRACTS or of the Texas three-prong promissory estoppel have been established. There is no evidence that the plaintiffs promised the defendants anything, that they could foresee any reliance by the defendants, or that the defendants relied on a promise by the plaintiffs to defendants' detriment.[14]

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[14] The district court apparently relied on *Sunkist*, *McBro* and two Texas decisions, *Carlin v. 3V Inc.*, 928 S.W.2d 291 (Tex.App. – Houston [14th Dist.] 1996, no writ) and *Fridl v. Cook*, 908 S.W.2d 507(Tex.App.-El Paso 1995, writ dism'd w.o.j.). These decisions are not relevant to the present case. *Sunkist* and *McBro* are inapposite for the reasons stated earlier. *Carlin* is inapt because its essential holding was simply that an assignee of an assignor's rights and duties under a contract assumes and is bound by the arbitration clause in the contract when the assignee asserts a breach of contract claim under the contract against the other signatory party to the contract. *Fridl* is irrelevant because its main holding was simply that a breach of contract claim based on a contract containing an arbitration clause is subject to arbitration.

For all of these reasons, I believe that the majority has fallen into a number of serious, harmful legal errors in the present case. The amorphous, misnamed estoppel theories of *MS Dealer, Sunkist, McBro,* and *Hughes* conflict with and endanger the basic principles that the Supreme Court has held must be adhered to in compelling a person to submit to commercial arbitration, viz., (1) a person cannot be required to submit to arbitration any dispute which he has not agreed so to submit, (2) a person who has not agreed to arbitrate will normally have a right to a court's decision about the merits of its dispute, and (3) ordinary state-law principles governing the formation of contracts should be applied when deciding whether the parties agreed to arbitrate a certain matter. This court is not bound by the court of appeals' decisions in the *Hughes-McBro* line of cases and should not attempt to follow them.

However, the majority erroneously attempts to follow *MS Dealer* and compounds its error by mistaking *MS Dealer's* highly abstract explanatory "equitable estoppel" principles for the Eleventh Circuit's complete *ratio decidendi*. Consequently, the majority overlooks the significance of the material facts upon which the *MS Dealer* decision is actually based. In contrast with the present uncomplicated case, *MS Dealer* involved an integrated network of interlocking agreements anchored in a buyer's order containing an arbitration agreement. The signatories of the buyer's order, Franklin and Jim Burke Motors, and the non-signatory of those two documents, MS Dealer, struck a bargain in which each person agreed to exchange promises of performance with the others. *See* RESTATEMENT (SECOND) OF CONTRACTS § 17. Each of the three

parties manifested mutual assent to the bargain or exchanges of promises by intentional conduct from which he or she knew or had reason to know the other parties would infer such assent. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 18, 19. Each of the parties, including Franklin in particular, knew or had reason to know that the buyer's order contained an arbitration agreement and incorporated by reference the retail installment contract and the vehicular service contract. Thus, the rationale of *MS Dealer* can be viewed as limited by its material facts and even as an enforcement of an agreement implied in fact. Consequently, if *MS Dealer* merely enforces an agreement implied in fact, it does no violence to the principles that a party cannot be forced to submit to arbitration a dispute that he has not agreed to so submit according to the application of ordinary state-law principles that govern the formation of contracts. The majority, on the other hand, by disregarding the important material facts underlying *MS Dealer*, and by adopting and applying only that decision's skeletal explanatory theory, unleashes an indeterminate precedent capable in its application of sweeping countless parties' disputes into arbitration without even a semblance of their agreement under ordinary state-law principles of contracts, agency or equitable estoppel.

The majority also misstates the applicable standard of review, although the error may not have had any effect upon its decision. In *First Options*, the Supreme Court held that the standard a court of appeals should apply when reviewing a district court decision that refuses to vacate or confirms an arbitration award should proceed

by accepting findings of fact that are not clearly erroneous but deciding questions of law de novo. *See First Options*, 514 U.S. at 948. "We believe . . . that the majority of Circuits is right in saying that courts of appeals should apply ordinary, not special, standards when reviewing district court decisions upholding arbitration awards. For one thing, it is undesirable to make the law more complicated by proliferating review standards without good reasons." *Id.* This court followed *First Options* in *General Motors Corp. v. Pamela Equities Corp.*, 146 F.3d 242, 246 (5th Cir. 1998) and *F.C. Schaffer & Assocs., Inc. v. Demech Contractors, Ltd.*, 101 F.3d 40, 43 (5th Cir. 1996). Accordingly, the standard of review should be the same in this case in which we are reviewing a district court's decision that compels parties either to submit a dispute to arbitration (that they contend they have not agreed to so submit) or to abandon their right to a court's decision about the merits of the dispute. Previous decisions of this circuit and others have said that we review the grant or denial of a motion to compel arbitration de novo. *See Webb v. Investacorp, Inc.*, 89 F.3d 252, 257 (5th Cir. 1996); *Snap-On Tools Corp. v. Mason*, 18 F.3d 1261, 1264 (5th Cir. 1994); *Armijo v. Prudential Ins. Co. of Am.*, 72 F.3d 793, 796 (10th Cir. 1995); *Kidd v. Equitable Life Assurance Soc'y of the United States*, 32 F.3d 516, 518 (11th Cir. 1994); *Sunkist*, 10 F.3d at 756; *Britton v. Co-op Banking Group*, 4 F.3d 742, 744 (9th Cir. 1993); *Trap Rock Indus., Inc. v. Local 825, Int'l Union of Operating Engineers, AFL-CIO*, 982 F.2d 884, 887 (3d Cir. 1992); *MidAmerica Federal Sav. and Loan Ass'n v. Shearson/American Express, Inc.*, 886 F.2d 1249, 1259 (10th Cir. 1989). Paradoxically, the majority opinion states that we review to determine only whether the district court

has abused its discretion in applying equitable estoppel, but that an application of law that is erroneous, or an assessment of the evidence that is clearly erroneous, constitutes an abuse of discretion. These contradictory statements of the standard can only lead to confusion. In my opinion, abuse of discretion does not belong in our standard for reviewing whether the ordinary state-law requisites of promissory or equitable estoppel have been met, but the district court may well have discretion in limiting the remedy as justice requires. *See* RESTATEMENT (SECOND) OF CONTRACTS § 90(1).

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 98-51016

D.C. Docket No. A-98-CV-235-JN

CHARLES O GRIGSON, as Trustee for
"The Texas Chainsaw Massacre";
RIVER CITY FILMS INC; ULTRA MUCHOS INC

Plaintiffs – Appellants

v.

CREATIVE ARTISTS AGENCY LLC;
MATTHEW DAVID MCCONAUGHEY

Defendants – Appellees

Appeal from the United States District Court for the Western District of Texas, Austin

Before DUHÉ, BARKSDALE, and DENNIS, Circuit Judges.

JUDGMENT

(Filed April 24, 2000)

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that plaintiffs-appellants pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

DENNIS, Circuit Judge, dissenting:

ISSUED AS MANDATE: JUN 12 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CHARLES O. GRIGSON, as Trustee for "THE TEXAS CHAINSAW MASSACRE", ET AL.	§	CIVIL NO. A-98-CA-235 JN
VS.	§	
CREATIVE ARTISTS AGENCY, L.L.C. and MATTHEW DAVID McCONAUGHEY	§	

ORDER

(Filed Sept. 18, 1998)

Before the Court is Defendants' Motion to dismiss or Alternatively to Stay Proceedings and Compel Arbitration (Clerk's Doc. No. 8) filed May 29, 1998, Plaintiffs' Response In Opposition (Clerk's Doc. No. 14) filed June 15, 1998, and Defendants' Reply (Clerk's Doc. No. 15) filed June 16, 1998. Upon review of the motions, responses, replies, the applicable legal authorities, and the entire case file, the Court enters the following Order.

BACKGROUND

This action arose from a dispute over the distribution of a horror movie entitled "Return of the Texas Chainsaw Massacre". The movie is also known as "Texas Chainsaw Massacre: The Next Generation". Plaintiff Charles Grigson is the trustee for the owners of the "Texas Chainsaw

Massacre" and is a Plaintiff in that capacity only. Plaintiffs Ultra Muchos, Inc. and River City Films, Inc. produced the motion picture "Return of the Texas Chainsaw Massacre". The movie was completed and available for distribution in 1995.

On October 31, 1995, Plaintiffs Ultra Muchos and River City contracted with Columbia TriStar Home Video, Inc. for the distribution of the film. This agreement shall be referred to as the Distribution Agreement. Columbia TriStar obtained exclusive distribution rights to the movie. In return, Plaintiffs Ultra Muchos and River City received a minimum guarantee and a right to a share in the gross receipts of the film. As previously determined in the Trustee's Agreement, the owners of "The Texas Chainsaw Massacre" would receive a portion of the share of gross receipts received by Plaintiffs Ultra Muchos and River City.

The movie was filmed in Central Texas in 1993 and 1994. Among those who contracted for, and received, acting positions in the film were Defendant Matthew David McConaughey and Rene Zellweger. In June of 1993, Defendant McConaughey executed an "Actor Contract" with Defendant Ultra Muchos. Before the movie was distributed, Ms. Zellweger and Defendant McConaughey became well-known film stars. Ms. Zellweger appeared in "Jerry Maguire". Defendant McConaughey appeared in "A Time to Kill". He went on to star in such movies as "Lone Star", "Contact", and "Amistad". Defendant Creative Artists Agency, L.L.C. (hereafter referred to as Creative Artists) serves as Defendant McConaughey's agent.

Plaintiffs allege that Columbia TriStar's release of the movie initially was delayed to take advantage of Ms. Zellweger's starring role in "Jerry Maguire", whose release was also handled by Columbia TriStar. Plaintiffs claim that Columbia TriStar planned to promote the film with movie posters that prominently featured Defendant McConaughey and Ms. Zellweger. Plaintiffs further allege that in the fall of 1996 or early 1997, Defendant Creative Artists, as agent for McConaughey, pressured Columbia TriStar into retreating from that plan for the movie posters. Plaintiffs also allege that during the same time, Defendants Creative Artists and McConaughey pressured Columbia TriStar not to undertake a major release of the movie. Plaintiffs claim that as a result of this alleged pressure, Columbia TriStar made only a limited release of the movie in the summer of 1997 in approximately fifteen theaters in nine cities.

Plaintiffs claim that because of the limited release, the receipts produced by the movie's release were greatly reduced. Plaintiffs argue that the reduced yield resulted in monetary damage to Plaintiffs. Plaintiffs allege that but for the actions of Defendants, the movie's yield would have been millions of dollars more. Plaintiffs bring claims against Defendant McConaughey for breach of his Actor's Contract and for tortious interference with the Distribution Agreement. Plaintiffs bring claims of tortious interference against Defendant Creative Artists with respect to the Distribution Agreement and McConaughey's Actor's Contract.

Plaintiffs previously brought suit in this Court against Columbia TriStar for allegedly breaching the Distribution Agreement. That suit was dismissed because of

a mandatory arbitration clause contained in the Distribution Agreement. Defendants ask the Court to enforce the same arbitration clause in this action. Defendants point out that federal and state law favor arbitration. *See Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983); *Prudential Sec., Inc. v. Marshall*, 909 S.W.2d 896, 898 (Tex. 1995).

THE DISTRIBUTION AGREEMENT

The Distribution Agreement was entered into between Colombia TriStar and Plaintiffs Ultra Muchos and River City. The Distribution Agreement provides that it is governed by California law and that it applies to:

> 22.(d) . . . (i) the validity and interpretation of this agreement, (ii) the performance of the Parties of their respective obligations [thereunder], and (iii) all other causes of action (whether sounding in contract or in tort) arising out of or relating to this Agreement, or the termination of this Agreement.

Distribution Agreement, ¶ 22(d). The Parties included an arbitration clause in the Distribution Agreement. The arbitration clause provides:

> 22.(e) The Parties hereto agree that any dispute or controversy relating to any of the matters referred to in clauses (d)(i), (ii), or (iii) above, shall be decided by a Rent-A-Judge, mutually selected by the Parties (or, if they cannot agree, by the Presiding Judge of the Los Angeles Superior Court) appointed in accordance with California Code of Civil Procedure Section 638, sitting without a jury, in Los Angeles County

> California, and the Parties hereby submit to the jurisdiction of such court.

Distribution Agreement, ¶ 22(e).

Defendants point out that Plaintiffs agreed to submit to arbitration any dispute "relating to" causes of action "arising out of" the Distribution Agreement. Defendants argue that all of Plaintiffs' claims stem from Plaintiffs' allegation that Defendants pressured Columbia TriStar to limit the distribution of the film. Defendants point out that Plaintiffs [sic] Complaint refers to the Distribution Agreement as the "focal point of this lawsuit." Defendants suggest that Plaintiffs' claims fall with the scope of the arbitration clause. Plaintiffs do not contest that such claims could fall within the scope of the arbitration clause. However, Plaintiffs argue that Defendants have no standing to enforce the arbitration agreement.

Plaintiffs point out that Defendants were not Parties to the Distribution Agreement. Neither of the Defendants were signatories to the contract. Plaintiffs maintain that Defendants do not have standing to move for dismissal based upon the arbitration agreement. Plaintiffs also argue that Texas law does not allow non-signatories to enforce an arbitration agreement. Defendants maintain that Texas and federal courts have done just that on numerous occasions. *See Carlin v. 3V Inc.*, 928 S.W.2d 291, 294-96 (Tex.App.-Houston [14th Dist.] 1996, no writ); *Fridl v. Cook*, 908 S.W.2d 507, 513-14 (Tex.App.-El Paso 1995, writ dism'd w.o.j.); *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 758 (11th Cir. 1993), cert.

denied, 513 U.S. 869 (1994); *McBro Planning and Development Co. v. Triangle Electrical Constr. Co., Inc.*, 741 F.2d 342, 344 (11th Cir. 1984).

The Court has reviewed the applicable case law and arguments of both Parties. The Court finds that the equitable estoppel exception applies in this action. Accordingly, the court finds that Defendants have standing to enforce the arbitration agreement. The Court further finds that Plaintiffs' claims are so intertwined with and dependent upon the Distribution Agreement that the arbitration agreement within the Distribution Agreement should be given effect.

The arbitration clause contains a forum selection clause. The arbitration clause specifies Los Angeles County as the proper forum. Defendants contend that the proper procedure in a case where the contract designates a particular state's court as the exclusive forum to arbitrate disputes is to dismiss the case entirely. *See International Software Systems, Inc. v. Amplicon, Inc.*, 77 F.3d 112, 114 (5th Cir. 1996). The Court finds that this action should be dismissed so that the Parties may proceed to arbitration in the proper forum.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendants' Motion to Dismiss or Alternatively to Stay Proceedings and Compel Arbitration (Clerk's Doc. No. 8) is hereby GRANTED and that the above entitled cause of action is hereby DISMISSED pursuant to 28 U.S.C. § 1406(a) and Rule 12(b)(3).

SIGNED AND ENTERED this 18th day of September, 1998.

/s/ James R. Nowlin
JAMES R. NOWLIN
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CHARLES O. GRIGSON,	§	
as Trustee for "THE TEXAS	§	
CHAINSAW MASSACRE", ET AL.	§	
	§	
VS.	§	
	§	CIVIL NO.
CREATIVE ARTISTS	§	A-98-CA-235 JN
AGENCY, L.L.C. and MATTHEW	§	
DAVID MCCONAUGHEY	§	

FINAL JUDGMENT

(Filed August 18, 1998)

Before the Court is the above entitled cause of action. Upon review of the entire case file and this Court's Order, which granted Defendants' Motion to Dismiss, the Court enters the following Final Judgment in this action pursuant to Federal Rule of Civil Procedure 58.

IT IS ORDERED, ADJUDGED AND DECREED that the above entitled cause of action is hereby DISMISSED WITHOUT PREJUDICE pursuant to Federal Rule of Civil Procedure 12(b)(3).

IT IS FURTHER ORDERED that this cause is CLOSED and that any pending motions are hereby DENIED AS MOOT.

SIGNED AND ENTERED this 18th day of September, 1998.

/s/ James R. Nowlin
JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-51016

CHARLES O GRIGSON, as Trustee for
"The Texas Chainsaw Massacre";
RIVER CITY FILMS INC;
ULTRA MUCHOS INC

Plaintiffs – Appellants

v.

CREATIVE ARTISTS AGENCY LLC;
MATTHEW DAVID MCCONAUGHEY

Defendants – Appellees

Appeal from the United States District Court
for the Western District of Texas, Austin

ON PETITION FOR REHEARING EN BANC

(Opinion 4/24/00, 5 Cir.,___, ___ F.3d ___)

(Filed June 1, 2000)

Before DUHÉ, BARKSDALE, and DENNIS, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R.

APP. P. and 5TH CIR. R. 35), the Petition for Rehearing en Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is Denied.

ENTERED FOR THE COURT:

/s/ Rhesa H. Barksdale
United States Circuit Judge

Judge King did not participate in the consideration of the petition for rehearing en banc.

Supreme Court, U.S.
FILED
OCT 25 2000
CLERK

(2)

No. 00-532

In The

Supreme Court of the United States

CHARLES O. GRIGSON, as Trustee for the Owners of *The Texas Chainsaw Massacre*, RIVER CITY FILMS, INC., and ULTRA MUCHOS, INC.,

Petitioners,

vs.

CREATIVE ARTISTS AGENCY, L.L.C. AND MATTHEW DAVID McCONAUGHEY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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14pp

QUESTION PRESENTED FOR REVIEW

Whether the federal policy favoring arbitration encompasses a claim for tortious interference asserted against non-signatories accused of concerted misconduct with signatories to a contract containing an arbitration clause.

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STATEMENT OF THE CASE

The facts necessary to address the arguments set forth in Grigson's Petition are adequately presented in the Fifth Circuit's opinion. *See* Pet. App. 2a-5a; 9a-14a.

Grigson's Petition includes a more elaborate description of the underlying facts, asserting (among other things) that Creative Artists Agency "successfully pressured TriStar" and that "TriStar succumbed to Creative Artists and made only a limited theatrical release." Petition at 5. These statements are paraphrases of unproven allegations contained in the Plaintiffs' Original Petition filed in Texas state court. *See id.; compare* R. 21. Grigson's allegations of misconduct by Creative Artists Agency and McConaughey were made "upon information and belief." R. 21. Due to the district court's resolution of the arbitration issue, the case never proceeded to the stage where Grigson was required to proffer evidence in support of his allegations on the merits of his claims. The respondents denied Grigson's allegations that TriStar was pressured. R. 231-32, 236.

Grigson's statement that the district court "granted the motion to compel arbitration" is incomplete. Petition at 6. Creative Artists and McConaughey filed Defendants' Motion to Dismiss or Alternatively to Stay Proceedings and Compel Arbitration. R. 85. Creative Artists and McConaughey sought dismissal for improper venue under Federal Rule of Civil Procedure 12(b)(3) because the arbitration clause required arbitration in Los Angeles, California. R. 94. The district court's order and judgment stated that the case was being dismissed based on improper venue pursuant to Rule 12(b)(3) and 28 U.S.C.

§ 1406(a); the judgment and order did not say that arbitration was being compelled, although that was the practical effect of the dismissal. Pet. App. 43a; 45a.

Grigson's passing reference to his prior suit against Columbia TriStar Home Video, Inc., and the dismissal of that prior suit after a motion to compel arbitration was filed, also presents an incomplete picture of the posture of this case. *See* Petition at 5.

As the Fifth Circuit observed, Grigson engaged in an "obvious attempt to make an end-run around the arbitration clause" by (1) first suing TriStar on the contract containing the arbitration clause, and then (2) dropping the suit against TriStar in favor of a second suit against non-signatories for allegedly pressuring TriStar and interfering with that same contract. Pet. App. 11a-12a. "[T]his is a quite obvious, if not blatant, attempt to bypass the agreement's arbitration clause." Pet. App. 12a.

These circumstances form the backdrop against which the courts below were required to assess the strong federal policy favoring arbitration and its application to this case.

ARGUMENT

This case involves the application of federal policy favoring arbitration in light of Grigson's "quite obvious, if not blatant, attempt to bypass" an arbitration clause. Pet. App. 12a. The district court correctly rejected this "obvious attempt to make an end-run around the arbitration clause" (Pet. App. 11a) by dismissing Grigson's suit

so it could be arbitrated in the proper venue. Pet. App. 43a-45a. In affirming this decision, the Fifth Circuit properly applied this Court's teaching regarding the favored status of arbitration and ruled in a manner consistent with the approach taken by the Seventh and Eleventh Circuits.

The court of appeals' decision is correct. It creates no conflict with the decisions of this Court or any other court of appeals. The decision addresses a uniquely fact-bound situation and therefore presents no issue of broad public importance requiring this Court's intervention. Further review is not warranted.

I. The Courts Below Correctly Applied Federal Policy Favoring Arbitration and Properly Rejected Grigson's "Obvious" Attempt to Avoid Arbitration

The starting point of the analysis must be the policy favoring arbitration under federal law. "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

The arbitration clause in the distribution agreement with TriStar provides that arbitration in California is the exclusive forum in which any disputes related to the distribution agreement are to be decided. The clause states that

> . . . any dispute or controversy relating to any of the matters referred to in clauses (d)(i), (ii) or (iii), above, shall be decided by a Rent-A-Judge, mutually selected by the parties (or, if they cannot agree, by the Presiding Judge of the Los

> Angeles Superior Court) appointed in accordance with California Code of Civil Procedure Section 638, sitting without a jury, in Los Angeles County California, and the Parties hereby submit to the jurisdiction of such court.

Pet. App. 4a.

Paragraphs 22(d)(i) through (iii) provide that the arbitration clause covers disputes relating to:

> (i) the validity and interpretation of this agreement, (ii) the performance by the Parties of their respective obligations hereunder, and (iii) ***all other causes of action (whether sounding in contract or in tort) arising out of or relating to this Agreement***. . . .

Pet. App. 4a-5a (emphasis added). Grigson's prompt dismissal of his initial suit against TriStar after TriStar moved to compel arbitration serves as a tacit admission that the arbitration clause encompasses claims that the *Chainsaw* movie was not promoted with sufficient vigor. *See* Pet. App. 11a-12a.

The federal policy favoring arbitration would be thwarted if dodging an arbitration clause was as easy as alleging that a non-signatory tortiously interfered with the contract containing the arbitration clause. *See* Pet. App. 8a. "[I]t would be especially inequitable where, as here, a signatory non-defendant is charged with interdependent and concerted misconduct with a non-signatory defendant." *Id.*

Thus, the panel majority's holding properly prevents Grigson from trying to have it both ways by (1) seeking

to hold a non-signatory liable pursuant to the agreement's terms, while (2) simultaneously denying the enforceability of the agreement's arbitration term as to the non-signatory. *Id.*

Grigson cannot escape the logical force of this conclusion by characterizing the panel majority's decision as a dangerous "equitable discretion overlay" that "threatens to extinguish the rights of many parties. . . . " Petition at 11, 13. The panel majority's opinion faithfully upholds the right to arbitration consistent with this Court's command that "district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds v. Byrd*, 470 U.S. 213, 218 (1985) (original emphasis). That is just what the district court did here in the context of contract language peculiar to the entertainment industry and the unique facts surrounding Grigson's efforts to bypass a broad arbitration clause.

Nor can Grigson create an issue worthy of review by seizing on the notion of district courts using boundless and unreviewable "discretion" to decide questions of arbitrability. The panel majority defined "abuse of discretion" as follows: "To constitute an abuse of discretion, the district court's decision must be either premised on an application of the law that is erroneous, or on an assessment of the evidence that is clearly erroneous." Pet. App. 9a. This formulation comports with this Court's teaching. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947-48 (1995) (review of decision on whether parties agreed to arbitrate "should proceed like review of any other district court decision finding an agreement between parties, e.g., accepting findings of fact that are

not 'clearly erroneous' but deciding questions of law de novo") (citations omitted).

II. The Fifth Circuit's Opinion Comports With Every Other Circuit Addressing the Federal Policy Favoring Arbitration Under These Circumstances

Courts routinely enforce arbitration agreements in cases involving tortious interference claims when, as here, such claims "arose out of" the contract subject to the interference. *See, e.g., Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 755 (11th Cir. 1993) ("any controversy or claim arising out of or relating to this Agreement" encompassed tortious interference claim); *McBro Planning & Dev. Co. v. Triangle Elec. Constr. Co.*, 741 F.2d 342, 343 (11th Cir. 1984) ("any controversy 'arising out of or relating to this [contract] . . . ' " encompassed tortious interference claim); *Hughes Masonry Co. v. Greater Clark County Sch. Bldg. Corp.*, 659 F.2d 836, 837 (7th Cir. 1981) ("all disputes 'arising out of, or relating to, this contract or the breach thereof . . . shall be decided by arbitration' " encompassed tortious interference claim).

The panel majority's holding therefore maintains uniformity among the circuits by rejecting efforts to avoid arbitration via tortious interference claims. Non-signatory parties properly enforce arbitration clauses under an equitable estoppel theory where the claims against them are "fundamentally grounded" in, "intimately founded in and intertwined with" or arise out of and relate directly to the agreement containing the arbitration clause. *See, e.g., Sunkist*, 10 F.3d at 758; *McBro*, 741 F.2d at 344; *Hughes*,

659 F.2d at 838. Consistent with federal policy, the equitable estoppel theory prevents a plaintiff from having it both ways; it precludes a plaintiff from relying on a contract when it works to the plaintiff's advantage and simultaneously ignoring other portions of the same contract with which the plaintiff does not want to comply. *See Hughes*, 659 F.2d at 839.

III. The Result Here Comports With State Law

Grigson's complaint that state-law principles have been trampled is difficult to square with the reported case law. Courts in Texas have applied the doctrine of equitable estoppel to prevent parties from relying on certain portions of a contract to support their claims while repudiating other portions of the contract. *See, e.g., Carlin v. 3V Inc.*, 928 S.W.2d 291, 294-96 (Tex. App. – Houston [14th Dist.] 1996, no writ). In *Carlin*, the court held that 3V was equitably estopped to avoid arbitration of its claims against a non-signatory since 3V's claims arose out of and were directly related to an agreement containing the arbitration provision. *Id.* at 297. *See also Merrill Lynch, Pierce, Fenner & Smith v. Eddings*, 838 S.W.2d 874, 880 (Tex. App. – Waco 1992, writ denied). The panel majority's result is consistent with Texas law.

IV. The Courts Below Were Not Asked to Evaluate a Blanket Prohibition of an Equitable Estoppel/ Intertwining Theory

Grigson's Petition launches a frontal assault on the intertwining/equitable estoppel theory now applied by the Fifth, Seventh, and Eleventh Circuits, declaring it

antithetical under all circumstances to the Seventh Amendment and the principles underlying the FAA. *See* Petition at 12 ("Discretionary additions or subtractions to or from [the core FAA requirement] . . . in the name of equity and fairness, using such amorphous doctrines as 'intertwined' claims, have no place under the statute and its contract law grounding").

This is a shift from Grigson's position before the Fifth Circuit. There he relied primarily upon a narrower argument (1) acknowledging that non-signatories can arbitrate in situations involving a "special relationship" with signatories to a contract containing an arbitration clause; and (2) urging that no such "special relationship" exists under the particular facts and circumstances of this case. *See* Brief For Appellants at 17-18, 21-24.

It is one thing to argue that a recognized theory does not apply under particular facts. It is quite another to argue that the same theory should not be recognized or applied under ***any*** set of facts. *See* Petition at 15 ("Just as the Court in *Dean Witter* redirected the three federal circuits whose arbitration theories had strayed beyond the confines of the FAA, so should the Court in this case redirect the three circuits who again are straying from the FAA, using the same theory but moving into a different forbidden field of equitable discretion in federal arbitration law"); *compare* Pet. App. 5a ("Appellants contend . . . they are *not* required to arbitrate with Defendants . . . because, in the alternative, Defendants do not fall within what Appellants view as the quite limited bases for application of equitable estoppel to compel

arbitration: either a special relationship to the distribution agreement signatories, or a role in carrying out the agreement's obligations") (original emphasis).

In the absence of a circuit split, Grigson has tried to cobble together an issue worthy of this Court's attention by extrapolating from *Dean Witter*. *See* Petition at 12. Grigson did not cite *Dean Witter* in his opening Fifth Circuit brief, his reply brief, or his petition for rehearing en banc. Nor did he cite *Dean Witter* in his trial court briefing. R. 179-90. Grigson did not contend below, as he does in this Court, that *Dean Witter* "removed that 'doctrine of intertwining' from federal arbitration law." Petition at 11. The closest he came to making such an argument in his panel briefing was a passing criticism of the equitable estoppel/intertwining theory as "somewhat of a legal stretch." Brief For Appellants at 25. The primary thrust of his argument below was a fact-intensive contention that "[t]he relationships to the contract and the contracting parties that are required under the estoppel exception simply are not present in this case." *Id.*

Perhaps following Grigson's lead, the dissent also does not analyze this case in terms of a conflict with *Dean Witter* or any purported invalidation of an intertwining theory by *Dean Witter*. *See* Pet. App. 14a-35a. The dissent devotes most of its effort to distinguishing the Seventh and Eleventh Circuit cases on their facts, and argues that these cases really involve an implied-in-fact agreement to arbitrate rather than an equitable estoppel situation. *Id.* at 19a-26a. That too is a different argument from the one presented in Grigson's Petition.

Under these circumstances, the Fifth Circuit and the district court were not clearly asked to resolve a facial challenge to the intertwining/equitable estoppel theory as

it has been framed in Grigson's Petition, and these courts were not afforded a fair opportunity to evaluate such a challenge. This Court in turn has been denied the benefit of the lower courts' consideration, refinement, and resolution of the issue presented in Grigson's Petition.

Therefore, this Court should follow its ordinary practice and decline to consider a question that has not been raised in the lower court. *See, e.g., Youakim v. Miller*, 425 U.S. 231, 234 (1976); *see also First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 280 n.16 (1968) ("[W]e cannot attribute error to the courts below for their failure to discern such a theory, nor would it be appropriate at this stage in the case for us to pass upon petitioner's theory . . . ").

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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